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Supreme Court, U.S.
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No. 94-226

In The

Supreme Court of the United States

October Term, 1994

THE FLORIDA BAR,

Petitioner,

vs.

G. STEWART McHENRY; WENT FOR IT, INC.; and JOHN T. BLAKELY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether a state bar association rule which prohibits truthful, non-misleading targeted direct mail lawyer advertising for 30 days after a personal injury or accident conflicts with *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988)?

II. Whether a state bar association rule which prohibits truthful, non-misleading targeted direct mail personal injury lawyer advertising for 30 days after a personal injury or accident is content-based, and therefore an invalid time, place, and manner restriction on protected commercial speech?

LIST OF PARTIES

G. Stewart McHenry, Plaintiff below and named by Petitioner as a Respondent in this Court, was not a party to the proceedings in the Eleventh Circuit and should not be named in this proceeding. Rule 12.4, R.S.Ct. There is no continuing case or controversy between The Florida Bar and Mr. McHenry; his claims against The Florida Bar became moot upon his disbarment during the district court proceedings. (*See* Petition for Writ of Certiorari, p. 5, and App. 19-20, 34-35).

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DECISIONS BELOW

The district court and court of appeals decisions in this case are cited incorrectly in the Petition for Writ of Certiorari, at page 1. The decision below is reported at 21 F.3d 1038 (11th Cir. 1994). The district court decision is reported at 808 F. Supp. 1543 (M.D. Fla. 1992).

STATEMENT OF THE CASE

Petitioner's Statement of the Case fails to present an accurate description of the proceedings below. Therefore Respondents submit this summary of the district court and Eleventh Circuit proceedings.

The Florida Bar devotes the first two pages of its Statement of the Case to a survey it conducted in 1987, five years prior to the initiation of this action in the district court. That survey played no substantive role in this case.

The Florida Bar survey, in its entirety, is not part of the record in this case. Only a "Summary of the Record" of the survey was before the district court, and most of that summary is irrelevant to the issues in this case. Only two sections of the summary pertain to direct mail advertising — a 1987 attitude and opinion poll (Magid's "two telephone surveys of Florida adults"), and a compilation of anecdotal personal opinions on lawyer advertising. Both submissions lack any indicia of scientific reliability and provided no constitutional guidance to the courts below. Neither the district court nor the court of appeals commented on either "survey." The Petition's reliance on those unpublished materials distorts The Bar's description of this case.

Petitioner's presentation of the procedural history of this case also misleads by featuring the report and recommendation of the Magistrate Judge on the parties' cross-motions for summary judgment (Pet. at 5, Pet. App.1-17; *see also*, Pet. at 10). The Magistrate's recommendations were rejected by the district court and by the Eleventh Circuit. (Pet. App. 22-29; 30-46).

The district court found that *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), which upheld the constitutionality of targeted direct mail lawyer advertising, was controlling and dispositive:

"The substantial interests which Defendants allege were dealt with in *Shapero*." (Pet. App. 23). The district court also rejected The Florida Bar's argument that the challenged Rules were sustainable as time, place, and manner regulations, finding that the Rules were not "content neutral." (Pet. App. 26-27). The court granted summary judgment to the challengers:

> The challenged rules substantially impair and impede the availability of truthful and relevant information which can make a positive contribution to consumers in need of legal services. This Court holds that as a matter of law, the Florida Bar's thirty-day ban on personal injury and wrongful death targeted direct mail lawyer advertising violates the First, Fifth, and Fourteenth Amendments to the United States Constitution.

(Pet. App. 29).

The Eleventh Circuit affirmed, holding that neither of The Bar's asserted state interests (protecting traumatized persons who are unable to make an objective evaluation of a personalized solicitation from a lawyer; protecting personal privacy of injured persons and their families) justified a 30-day ban on "otherwise constitutionally protected direct mail advertising by attorneys." (Pet. App. 37). Relying on *Shapero*'s guidance that "[t]he relevant inquiry is the *mode* of communication," (Pet. App. 40, *citing Shapero* at 474, 108 S. Ct. at 1922) (emphasis in original), the Eleventh Circuit found that targeted direct mail advertising "possesses limited potential for overreaching. . . ." The court below also found that *Shapero* had considered and rejected The Bar's argument that a direct mail letter impermissibly invades the privacy of the recipient. (Pet. App. 43-44). Finally, like the district court, the Eleventh Circuit found that the challenged rules were

"unambiguously content-based," and thus were not subject to a time, place, and manner analysis. (Pet. App. 44-45).

Respondents have no objection to the remainder of Petitioner's Statement of the Case.

SUMMARY OF THE ARGUMENT

Certiorari should be denied because the decision below is consistent with this Court's decision in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988). *Shapero* upheld the constitutionality of truthful, non-misleading targeted direct mail lawyer advertising. The challenged rules of The Florida Bar, which impose a 30-day ban on such advertising, violate lawyers' First Amendment commercial speech rights as defined in *Shapero*. Petitioner's complete failure to distinguish or even to address *Shapero* is surprising and revealing. *Shapero* shuts the door on The Bar's argument.[1]

Moreover, the challenged rules are content-based restrictions on speech, and as such may not be upheld as reasonable time, place, and manner regulations, even if *Shapero* were not controlling.

Petitioner's invitation to the Court to use the narrow issues in this case as a springboard to "revisit the entire question of states' authority to regulate attorney solicitation" (Pet. at 10) is unwise and unwarranted. The Bar's suggestion that targeted direct mail lawyer advertising somehow jeopardizes "a stable democracy," *id.*, elevates hyperbole over principled reasons for review.

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1. Petitioner's only reference to *Shapero v. Kentucky Bar Ass'n*, (Pet. at 7), is to "the comments of Justices O'Conner [sic], Rehnquist and Scalia." Those comments were contained in a *dissenting* opinion, a fact omitted from Petitioner's reference.

In the absence of any conflict with this Court's commercial speech decisions, and in the absence of any important but answered question of law raised by the decision below, the Petition for Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW IS CONSISTENT WITH, AND WAS MANDATED BY, THIS COURT'S DECISION IN *SHAPERO V. KENTUCKY BAR ASSOCIATION.*

This Court's jurisdiction to review decisions of the courts of appeals is tied to those cases which involve substantial conflict with this Court's decisions or important questions of law which this Court has never addressed. Rule 10, R.S.Ct. This case, in contrast, presents a decision of the Eleventh Circuit Court of Appeals which, like the district court, declared a Florida Bar rule unconstitutional based on the specific teachings of *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988).

Shapero examined the advertising medium of targeted direct mail advertising and found it to be essentially incapable of inflicting the wounds on the public now claimed by The Florida Bar:

> The relevant inquiry is not whether there exist potential clients whose "condition" makes them susceptible to undue influence, but whether the *mode of communication* poses a serious danger that lawyers will exploit any such susceptibility.

* * *

> In assessing the potential for overreaching and undue influence, *the mode of communication makes all the difference.*
>
> * * *
>
> In short, both types of written solicitation [print advertising and targeted direct mail] "conve[y] information about legal services [by means] that [are] more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney." *Zauderer,* 471 U.S. at 642.

Shapero, 486 U.S. at 474-76 (emphasis supplied).

The challenged Rules attempted to do that which *Shapero* forbade — stop delivery of truthful, non-misleading targeted direct mail lawyer advertising. Rarely does a state regulation so patently violate established federal constitutional law. The decision below was correct, presented no conflict with *Shapero,* and certiorari should be denied.

II.

A 30-DAY BAN ON TRUTHFUL, NON-MISLEADING TARGETED DIRECT MAIL PERSONAL INJURY LAWYER ADVERTISING IS CONTENT-BASED, AND IS NOT A PERMISSIBLE TIME, PLACE, AND MANNER REGULATION OF SPEECH.

It is undisputed that only content-neutral restrictions on speech can be upheld on time, place, and manner grounds. (Pet. 15; Pet. App. 44; both *citing Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 294 (1984). Petitioner seeks review of the

decision below which found the 30-day ban on personal injury targeted direct mail lawyer advertising to be "unambiguously content-based," (Pet. App. 44, *see also,* district court decision at Pet. App. 26). The Florida Bar asserts that the 30-day Rule "has nothing to do with content," (Pet. 16 n.4) and should be upheld as a reasonable time, place, and manner regulation.

Both the plain words of the Rule, and the published Comment to the Rule, belie The Florida Bar's claim of content-neutrality. According to the Rule, a communication is prohibited only if it "*concerns an action for personal injury or wrongful death* or otherwise *relates to* an accident or disaster . . ." and if it is sent less than 30 days after the accident. (Rule 4-7.4(b)(1)(a); Pet. 2) (emphasis supplied). The Comment to the Rule explains, in relevant part:

> This rule allows targeted mail solicitation of potential plaintiffs or claimants in personal injury and wrongful death causes of action or other causes of action that relate to an accident, disaster, death, or injury, but only if mailed at least 30 days after the incident.

Thus, the Rule regulates targeted direct mail advertisements for specified causes of action, *not* specified recipients as the Bar claims. (*See* Pet. 16 n.4). Clearly, if a targeted direct mail lawyer advertisement letter which does *not* relate to an accident, disaster, death or injury is sent to the victim within 30 days, that letter — based on its content — would not violate Rule 4-7.4(b)(1)(a). Thus, the courts below correctly concluded that the challenged rules are content-based, and may not be justified as reasonable time, place, and manner regulations. Certiorari should be denied because the decision below is consistent with established law.

III.

THE DECISION BELOW APPLIES COMMERCIAL SPEECH PRINCIPLES IN A WAY WHICH DOES NOT CONFLICT WITH PERMISSIBLE RESTRICTIONS ON SPEECH IN SELECTED PUBLIC INSTITUTIONS.

Petitioner's primary argument in support of certiorari review is that Florida lawyers, as part of the "institution" of the administration of justice, should be subject to greater restrictions on commercial speech than those permitted by this Court's commercial speech precedents. (Pet. 9). The Florida Bar twists the cases and suggests that the court below has misapplied the law, and restricted *the State's* right to regulate speech. Of course the State's "right" is a limited one, since the First Amendment is a restraint upon governmental power, not a license to regulate. The regulation of speech requires the State to justify its restrictions. *See Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.12 (1993).

> It is well established that "[t]he *party seeking to uphold a restriction on commercial speech carries the burden of justifying it.*" . . . This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.

Edenfield v. Fane, 113 S. Ct. 1792, 1800 (1993) (citations omitted) (emphasis supplied). Having twice been told that it failed to meet that burden, Petitioner's new argument is that its right to regulate has been unfairly restrained.

That approach attempts to liken lawyers to prisoners, schoolchildren, members of the armed forces, and public employees, all of whom, by virtue of their status in public institutions, are subject to greater restrictions on speech than could be imposed upon the general public. (Pet. at 8). Assuming *arguendo* that private lawyers are part of the "institution" of the administration of justice, the flaw in the argument is that there are a host of existing rules and regulations which do limit lawyers' ability to engage in "pure" speech as well as commercial speech, if that speech is deemed harmful to the administration of justice.[2] However, this Court has already decided, in *Shapero*, that commercial speech in the form of a truthful, non-misleading targeted direct mail letter advertisement, has a limited potential for harm.

> [T]argeted, direct mail solicitation generally — "poses much less risk of overreaching or undue influence" than does in-person solicitation. . . . Unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter and the "reader of an advertisement . . . can 'effectively avoid

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2. *See e.g.*, R. Regulating Fla. Bar 4-1.6 ("A lawyer shall not reveal information relating to representation of a client . . ."); Rule 4-3.5 (limiting a lawyer's communication with a judge, juror, or other decision-maker); Rule 4-3.6 (limiting permissible extrajudicial statements pertaining to a case); Rule 4-3.7 (a lawyer may not serve as an advocate and a material witness); Rule 4-4.2 (limiting a lawyer's communication with persons represented by other counsel); Rules 4-7.1, 4-7.2 (limiting, *inter alia*, a statements that may be made in a lawyer's advertisement; precluding testimonials, dramatizations, multiple voices in electronic advertisements); Rule 4-7.4 (precluding in-person solicitation of prospective clients and regulating the contents of targeted direct mail solicitations); Rule 4-7.6 (limiting the ability of a lawyer to advertise that he or she is a "specialist"); and Rule 4-7.7 (regulating firm names, permissible letterheads).

> further bombardment of [his] sensibilities simply by averting [his] eyes.' "

Shapero, 108 S. Ct. at 1922-23 (citations omitted).

Petitioner baldly asserts that:

> the state must be given the latitude to regulate types of expression which are exercised within the context of certain fundamental public institutions when such expression is reasonably determined by the state to have an adverse impact upon the overall mission of the institution.

(Pet. at 9). Nothing in this record demonstrates any adverse impact upon the overall mission of the institution. Nor is there any support for the State's notion that "[t]he states have been hamstrung" by this Court's decisions. (Pet. at 10). This case was decided on summary judgment. (Pet. App. 18-29). The undisputed facts left only one question of law to be answered: was a 30-day ban on truthful, non-misleading targeted direct mail personal injury lawyer advertising consitutional? Guidance to the answer was provided by this Court's decision in *Shapero*. The decision below, and the district court decision, properly applied *Shapero* to the undisputed facts of this case. The Florida Bar's suggestion that *Shapero* and its progeny now need revisiting to preserve "a stable democracy" (Pet. at 10) substitutes rhetoric for principled reasons for certiorari review.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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